2002

# Eric P. Swenson v. Judge Lyle R. Anderson : Brief of Appellant

Utah Supreme Court


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IN THE UTAH SUPREME COURT

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| ERIC P. SWENSON, | ) | |
| Appellant, | ) | Case No.20020227-SC |
| v. | ) | |
| JUDGE LYLE R. ANDERSON, | ) | |
| Appellee. | ) | |

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BRIEF OF APPELLANT

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Appeal from The Seventh Judicial District Court In And For San Juan County, Utah, The Honorable Douglas L. Cornaby, Presiding.


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Appellant

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:** **Page:**

**Statutes and Court Rules:**

**Other Authority**

IN THE UTAH SUPREME COURT

| | |
|---|---|
| ERIC P. SWENSON,<br>Appellant,<br>v.<br>LYLE R. ANDERSON,<br>Appellee. | Case No. 20020227-SC |

# BRIEF OF APPELLANT

## STATEMENT OF JURISDICTION

This Court has jurisdiction in this matter pursuant to Utah Code Annotated § 78-2-2(3)(j).

## STATEMENT OF ISSUES

**a. Issues.**

1. Whether imposing sanctions and awarding fees for counsel's taking of a previous appeal amounted to an improper use of Ut. R. Civ. P., Rule 11 (Addendum, Exhibit 4).

2. Whether the district court erred in finding counsel to be *in violation of Rule 11(b)(1).*

3. Whether the district court erred in finding counsel to be in violation of Rule 11(b)(2).

4. Whether the district court erred in finding counsel to be in violation of Rule 11(b)(3).

All of these issues were preserved below. R. 1899-1968.

**b. Standard of Review.**

Utah appellate courts use a three-standard approach in reviewing a trial court's Rule 11 findings: (1) reviewing the trial court's findings of fact under a clearly erroneous standard; (2) reviewing the trial court's ultimate conclusion that Rule 11 was violated and any subsidiary legal conclusions under the correction of error standard; and (3) reviewing the trial court's determinations as to the type and amount of sanction to be imposed under the abuse of discretion standard. *Bernard v. Sutliff*, 846 P.2d 1229, 1233-1235 (Utah 1992).

The Court's determination that Rule 11 was violated was based on the case record and its construction and interpretation of that record is ultimately a question of law that must be reviewed without giving any deference to the trial court. *Morse v. Packer*, 973 P.2d 422, 424-425, ¶ 12 (Utah 1999).

The foregoing standards apply to all issues on appeal.

## DETERMINATIVE AUTHORITIES

Rule 11 (Addendum, Exhibit 4) is a determinative authority in this case. There is no determinative authority other than Rule 11, although reference to civil rules, statutes and case law will assist the Court in determining this appeal.

## STATEMENT OF THE CASE

### A. NATURE OF THE CASE

This is an action pursuant to the federal civil rights act, 42 U.S.C. § 1983, *et seq.*, concerning the exclusion of Native Americans from the jury selection process in the Seventh District

Court for San Juan County. Enforcement proceedings were brought in 1997 because the Utah Judicial Council (hereafter, Council) was out of compliance with a consent decree. An appeal was taken regarding three matters. One involved the liability of one Seventh District judge. A second question pertained to that judge's request for sanctions. A third involved plaintiff's request for attorneys fees from the Council. The questions of fees and sanctions were remanded to the district court. On remand, the district court ordered plaintiff's counsel to be sanctioned and awarded attorneys fees to the district court judge. Plaintiff's request for fees was denied. An appeal is taken only from the award of sanctions.

***B. COURSE OF PROCEEDINGS BELOW***

Pursuant to an Agreement of Parties (Addendum, Exhibit 1, R. 648-657) (hereafter, Agreement), an Order and Decree (Consent Decree), R. 678-679 (Addendum, Exhibit 2), was entered in 1996. The Agreement and Consent Decree resolved claims of racial discrimination and other violations by the Council regarding the exclusion of Native Americans from the jury list in the Seventh District Court for San Juan County, Utah. Id. at 648-649.

In 1997, plaintiff initiated a contempt and enforcement action alleging that the Council and a Seventh District Judge, Honorable Lyle R. Anderson, had violated the consent decree and/or aided and abetted the Council in the violation of the Agreement and Consent Decree. R. 684-725.

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On September 22, 1998, the trial court granted a motion to strike the allegations against Judge Anderson. R. 1185-1189. The

order followed a ruling from the Bench on August 14, 1998, R. 1600, Pages 3-8. The district court, the Honorable David Roth, denied the Judge's motion for Rule 11 sanctions. Id. Plaintiff filed an amended motion on October 13, 1998, R. 1256-1307, and proceeded to trial in December, 1998 on claims against the Council.

Following trial, Judge Roth entered Findings Of Fact And Conclusions Of Law And Judgment. R. 1555-1566.

Plaintiff took an appeal from the order granting the Motion to Strike as well as from an order denying costs and attorneys fees. R. 1588-1589. A cross appeal was taken regarding the denial of Judge Anderson's Motion for Sanctions. This Court determined all pending issues on appeal. See *Crank v. Utah Judicial Council*, 20 P.3d 307 (Utah 2001) (hereafter referred to as *Crank I*).

This Court overturned the district court's ruling denying plaintiffs' requests for attorneys fees from the Judicial Council and remanded the question for further determination. *Crank I*, 20 P.3d 307, 316-319, ¶¶ 38-43. This Court upheld Judge Roth's ruling denying sanctions under Rule 11(b)(1) by affirming the trial court's finding that counsel acted in good faith. Issues under Rules 11(b)(2)-(3) remanded for consideration by the district court. *Crank I*, at 20 P.3d 303, 316, ¶¶ 33-34.

### C. DISPOSITION BY THE TRIAL COURT ON REMAND

On remand, the district court denied plaintiff fees against the Council. R. 2057-2069 (Addendum, Exhibit 3, ruling). This issue is not on appeal. The district court also ruled that plaintiff's counsel must be sanctioned under Rule 11 and awarded

Judge Anderson partial attorneys fees. Id. at 2065-2069.

## STATEMENT OF FACTS

No factual findings regarding the alleged violations of Rule 11(b)(1)-(3) were made based on new evidence. The only new evidence adduced on remand came in the form of affidavits pertaining to fees and costs. No evidentiary hearings were held. The district court awarded sanctions based solely on its construction and interpretation of the.[1]

## SUMMARY OF ARGUMENT

1. Employing Rule 11 sanctions for counsel's taking the appeal in *Crank I* was an improper use of Rule 11. The appellate rules provide for sanctions for frivolous appeals and only this Court can impose such sanctions. This Court did not find that the appeal in *Crank I* was frivolous. The presumption that counsel's improper motive was substantiated by the taking of the first appeal violates the rule against irrebuttable presumptions and has no basis in the record.

An award of attorneys fees was inappropriate. Sanctions in the form of attorneys fees were inappropriate because they were imposed as punishment and not as a deterrence, as required by Rule 11(c)(2). Awarding fees was particularly inappropriate where there were disputed issues of fact involving whether there should be fees

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[1] However, memoranda submitted by Judge Anderson attempted to supplement the factual record in the same way that it was attempted in Crank I. R. 1740-1819; see also Appellant's Reply Brief, Crank I., Pages 1-4; 20-23. However, it is clear that the same record used by Judge Roth, and this Court in *Crank I*, is now the only proper record which can be used to review the district court's imposition of sanctions on remand.

Is this true?

imposed, the amount, the hourly rate and other factors placed into issue by counsel's affidavit on remand.

Fees should not be awarded for the first appeal because it operates to chill the right to appeal erroneous lower court decisions. Rule 11 should not be used as a weapon to intimidate lawyers who bring controversial lawsuits for poor and underprivileged clients. Counsel should be protected from this abuse of judicial power. This is especially important for the future rights of Native American jurors in San Juan County because the Council, with the assistance of Judge Anderson, is once again using jury lists which exclude Indian jurors.

2. Sanctions are not appropriate under Rule 11(b)(1) because counsel had a proper purpose in bringing the action against Judge Anderson. The proper motive was to effectively respond to the improper exclusion of Native Americans from the jury selection process in San Juan County and to address the judge's role in that process. The district court, Judge Roth, and this Court in *Crank I*, upheld the finding that counsel had no improper purpose. This is the law of this case and to contradict these rulings is error. In applying Rule 11(b)(1), the district court violated this Court's mandate on remand which required the district court to limit the issues to those in Rules 11(b)(2)-(3). Moreover, it was error for the district court to impose sanctions on the basis that an improper purpose was presumed from the taking of the first appeal in *Crank I* and that counsel's use of a ruling in a separate criminal case likewise presumes an improper purpose.

3. Counsel made a claim against Judge Anderson that he aided and abetted the Council's violation of the Consent Decree. A claim against a non-party for aiding and abetting a person or entity who is violating a court order is universally recognized by many jurisdictions. This is a viable claim presenting a plausible argument based on reasonable research that cannot be a basis for sanctions under Rule 11(b)(2). The elements of this claim are:

a. A non-party acts in concert with and in privity with a party to a court order;

b. The non-party has notice of the order.

c. A party to the court order is violating the order.

d. The non-party is aware that the party is violating the order.

e. The non-party acts or fails to act with the purpose of aiding and abetting the party in its violation of the Order.

Counsel's research into this area of the law amounted to a reasonable inquiry and, based on the record and the cases reflecting the law of other jurisdictions, was objectively reasonable.

Counsel also made claims that the judge directly violated the Agreement in two respects, that using lists which improperly excluded Native Americans violated the Agreement, ¶ 4 and by violating ¶ 8, which prohibits constitutional or statutory violations. These are plausible claims because there is also language from the Consent Agreement and Decree which arguably runs the force and effect of the injunction to non-parties who are

acting in concert with the Council.

In addition, counsel made a good faith argument that application of the theory underlying the aiding and abetting claim against Judge Anderson found in cases in other jurisdictions should be extended to the law in Utah. It was objectively reasonable for counsel to rely on the plain meaning of the terms of the Agreement and Consent Decree. This Court in *Crank I* implicitly acknowledged the validity of counsel's legal theory using Utah statutory law. This means that plaintiff's legal theory comports with existing Utah law. Rule 11 is not a fee shifting statute and its use in the manner employed by the district court is contrary to the rule in civil rights cases that attorneys fees may not ordinarily be awarded to prevailing defendants.

**4.** Rule 11(b)(3) cannot be a valid basis for imposing sanctions because counsel presented a proper factual basis in support of the legal claim, including verified pleadings, affidavits of witnesses and expert witnesses and a wealth of jury data and other facts about the jury selection process. The question of the sufficiency of the factual basis of the claims was not made by Judge Anderson in the original motion, not addressed by plaintiff or counsel, and not considered or ruled upon by Judge Roth in his initial ruling finding sanctions were inappropriate. The issue was raised by Judge Anderson for the first time on appeal. Such a claim has been waived.

Moreover, under Rule 11(c), counsel must be given notice of the claim and provided an opportunity to cure the alleged defect,

which was not done in this case. The process that concluded with counsel's sanction violated this rule. This also raises serious due process concerns. In *Crank I*, this Court, while noting that the facts were insufficient, did not hold that there were no facts alleged at all, and did not intimate in any fashion that sanctions for inadequately alleged facts could be a proper basis for sanctions. There are numerous factual allegations in the record and there was a factual showing on plaintiff's most important theory underlying the aiding and abetting claim that was adequate to avoid sanctions. Moreover, there was confusing and contradictory *dicta* in *Crank I* that the district court adopted on remand as a basis sanctions about the factual allegations that was mixed with claims that plaintiff never made.

## ARGUMENT

### POINT ONE

### Imposing sanctions on counsel for taking the appeal in *Crank I* was an improper use or Rule 11. Awarding fees as punishment and not for deterrence was improper. Sanctions must not be used to chill the right of appeal and intimidate lawyers bringing public interest litigation.

#### a. Sanctions for appeals should be reserved to the appellate courts.

The district court imposed sanctions under Rule 11(b)(1) on the basis that counsel's taking of the first appeal in *Crank I* demonstrates improper purpose. R. 2068-2069. Employing sanctions for counsel's taking of the appeal and awarding appeal fees in *Crank I* was an improper use of Rule 11 by the district court. *Cooter & Gell v. Hartmarx Corporation*, 496 U.S. 384, 405-409

(1990); see also Wright & Miller, Federal Practice & Procedure, Civil 2d, § 1336. In *Cooter*, the Court said "[on] its face, Rule 11 does not apply to appellate proceedings." Id. at 406. The rule only applies to events occurring in the district court. Id. The Court said:

> Neither the language of Rule 11 nor the Advisory Committee Note suggests that the Rule could require payment for any activities outside the context of district court proceedings....We believe Rule 11 is more sensibly understood as permitting award only of those expenses directly caused by the filing, logically, those at the trial level." Id.

The Court reasoned that the expenses related to the appeal are directly caused by the district court's sanctions and the appeal of the sanctions, not by the initial filing in the district court. Id. at 407. The *Cooter* Court's reasoning should be persuasive because it construes a rule similar to Utah's. See *Barnard v. Sutliff*, 846 P.2d 1229, 1233 (Utah courts look to federal case law to develop its interpretation of Rule 11).

Rule 11 is not a proper basis for a district court to sanction conduct occurring on the appeal level because that function is expressly reserved to the appellate courts. Appellate courts can impose sanctions for frivolous appeals. See Rule 33, Ut. R. App. P; *Featherstone v. Schaerrer*, 34 P.3d 194, 207 n. 11, ¶ 38 (Utah 2001) (appeal fees denied by appellate court as proper exercise of court's discretion); *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 940-941 (Utah 1998) (sanctions imposed by district court under Rule 11, fees for frivolous appeal imposed by Supreme Court under Rule 33). In *Cooter*, the Court said: "The Federal Rules of Appellate Procedure place a natural limit on Rule 11's scope." *Cooter & Gell*

*v. Hartmarx Corp.*, 496 U.S. 384, 407. The Court did not approve of the district court's award attorney fees to the appellee:

> ...even when the appeal would not be sanctioned under the appellate rules. To avoid this somewhat anomalous result Rules 11 and 38 are better read together as allowing expenses incurred on appeal to be shifted onto appellants only when those expenses are caused by a frivolous appeal, and not merely because a Rule 11 sanction upheld on appeal can ultimately be traced to a baseless filing in the district court. Limiting Rule 11's scope in this manner accords with the policy of not discouraging meritorious appeals. Id. at 407-408.

A frivolous appeal is one that is "...not grounded in fact, nor warranted by existing law, or not based on a good faith argument to extend, modify or reverse existing law." Rule 33(b); see also *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1256, 1272 (Utah 1998). In *Crank I* this Court did not find that the appeal was frivolous despite the request from Judge Anderson that the Court impose Rule 33 sanctions. See Judge Anderson's Appeal Brief, *Crank I*, Pages 28-30. The sanctions imposed on counsel are therefore improper because the district court used Rule 11 to circumvent the appellate process where this Court, at least implicitly, had rejected sanctions for the appeal.

And finally, Appellant is mindful that this Court issued a mandate on remand for the district court to consider appeal fees, including the judge's fees. *Crank I*, 20 P.3d 307, 319, 44 & n. 17 (citing *Valcarce v. Fitzgerald*, 961 P.2d 305, 319 (Utah 1998)). The Court did not consider the *Cooter* rule, a rule that may be especially appropriate in a case where the judiciary and the district court are the subject of the action. Thus, cases not applying *Cooter's* well-reasoned principles, such as *Valcarce*,

should no longer be the rule.

**b. Fees awarded as punishment conflicts with Rule 11's purpose of deterrence.**

An award of attorneys fees was inappropriate. Judge Roth determined that there would be no sanctions in this matter and specifically found that Attorney Swenson acted in good faith. See Point Two, *infra*. The Supreme Court upheld this finding. *Crank I*, 20 P.2d 307, 316, ¶ 32. This is significant because although improper purpose may amount to a violation of a subsection of Rule 11 (Rule 11(b)(1)), improper purpose appears not be the controlling factor in determining the type of sanctions. Apparently recognizing this concept, the Supreme Court stated that awarding attorneys fees is not a mandatory sanction. Id. at 316, ¶ 22.

Rather, Rule 11 states: "A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Rule 11(c)(2). The rule further states that if the violation is raised on motion, attorneys fees can be awarded as "...warranted for effective deterrence." Id. The trial court is not required to assess attorneys fees, but if it does it may do so "...only to the extent necessary 'to deter repetition of [the inappropriate] conduct or comparable conduct by others similarly situated.'Utah R. Civ. P. 11(C)(2) (2001)." *Featherstone v. Schaerrer*, 34 P.3d 194, 208, ¶ 41. Thus, the main purpose of Rule 11 is to deter not compensate. Wright & Miller, Federal Practice & Procedure, Civil 2d, § 1336. Rule 11 cannot be used as a fee shifting statute. Id.

Deterrence was not the district court's basis for awarding fees. The district court's ruling emphasized counsel's motives throughout the opinion. E.g., R. 2067-2068. Counsel's alleged improper motivation, and particularly the improper purpose alleged to have been established by the taking of the first appeal, was the only basis for the district court's award of attorneys fees. R. 2068-2069; see also R. 2068 (the purpose of the award is not to compensate but to impose sanctions). The sanctions were therefore punitive in nature. No other reason was given supporting the type of sanction that was imposed.

The district court never specified that deterrence was the basis for an award of attorneys fees. No findings were made at all regarding the deterrent effect of fees. Thus, the district court violated the rule's requirement that it "...explain the basis for the sanction imposed." Rule 11(c)(3); see also *Griffith v. Griffith*, 985 P.2d 255, 258, ¶ 10 (Utah 1999). This is particularly important for the proper administration of Rule 11. Id. The district court's authority to award fees is reviewed for an abuse of discretion. Id. (citing *Barnard v. Sutliff*, 846 P.2d 1229, 1233-1235). In *Crank*, the district court failed to make any findings at all regarding deterrence as required by the rule. No evidence was presented on this issue. The fee award should therefore be set aside because Rule 11 was not applied properly.

**c. The district court failed to properly resolve disputed issues of fact.**

An award of attorneys fees was especially questionable in light of the disputed facts evident in the record that were not

resolved by the district court with an evidentiary hearing prior to imposing sanctions. By affidavit, counsel raised questions about the amount of fees claimed, the alleged hourly rate and other documentation presented in support of a high fee request. See Declaration of Attorney Eric P. Swenson, R. 1957-1963. Given this conflict in the facts, awarding fees without allowing discovery and a full evidentiary hearing was error. There should have been a full evidentiary hearing to make Judge Anderson's lawyers prove up the alleged basis for their fees and to clear the air about the whether they were being entirely candid with the Court about their hourly rate. This would have been in accordance with the district court's obligation to independently analyze the reasonableness of the requested fees. *United Pac. Ins. Co. v. Durbano Constr. Co.*, 144 F.R.D. 402, 409 (D. Utah 1992) (quoting *White v. General Motors Corp.*, 977 F.2d 499, 501 (10th Cir. 1992)).

**d. Fees should not be awarded for the first appeal because it chill's the right of appeal of erroneous lower court decisions. It may also imperil the rights of Native American jurors by obstructing enforcement of the Consent Agreement.**

Fees should not be awarded for the first appeal because it operates to chill the right to appeal erroneous lower court decisions. Imposing sanctions in the form of fees as was done here for taking the first appeal is contrary to the rule that sanctions should only be reserved for the most egregious cases, "'lest there be an improper chilling of the right to appeal erroneous lower court decisions.'" *Taylor v. Hansen*, 958 P.2d 923, 931 (Utah App. 1998) (quoting *Porco v. Porco*, 752 P.2d 365, 369 (Utah App. 1988)

and followed in *Hudema v. Carpenter*, 989 P.2d 491, 503 n. 14 (Utah App. 1999)).

Allowing the district court to use Rule 11 to impose appellate fees operates to obstruct and intimidate litigants. This problem was addressed by the United States Supreme Court:

> Limiting Rule 11's scope in this manner accords with the policy of not discouraging meritorious appeals. If appellants were routinely compelled to shoulder the appellees' attorney's fees, valid challenges to district court decisions would be discouraged. The knowledge that, after an unsuccessful appeal of a Rule 11 sanction, the district court that originally imposed the sanction would also decide whether appellant should pay his opponent's attorney's fee would be likely to chill all but the bravest litigants from taking an appeal. See Webster v. Sowders, 846 F.2d 1032, 1040 (CA6 1988) ('Appeals of district court orders should not be deterred by threats [of Rule 11 sanctions] from district judges'). Moreover, including appellate attorneys fees in a Rule 11 sanction might have the undesirable effect of encouraging additional satellite litigation....It is possible that disallowing an award of appellate attorneys fees under Rule 11 would discourage litigants from defending the award on appeal when appellate expenses are likely to exceed the amount of the sanction. There is some doubt whether this proposition is empirically correct (citations omitted).....as Rule 11 is not a fee shifting statute, the policies for allowing district courts to require the losing party to pay appellate, as well as district court attorneys fees, are not applicable. 'A movant under Rule 11 has no entitlement to fees or any other sanction, and the contrary view can only breed litigation (citation omitted).' *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 408-409.

The district court's ruling in *Crank* is out of step with the common sense view in *Cooter* that sanctions on the district court level under Rule 11 must not usurp a function reserved to the appellate courts.

That decision-making employing only the benefit of hindsight can have undesirable effects on counsel is problem that had confronted the federal courts in reviewing fee applications in

civil rights case. How this problem has been dealt with may be instructive to this Court in the Rule 11 context. Awarding the attorneys fees to a prevailing defendant under the fee provision, 42 U.S.C. § 1988, is extremely rare, even for theories that some may regard to be frivolous or pretty far out. *Jane L. v. Bangerter*, 61 F.3d 1505, 1513-1517 (10th Cir. 1995).

In *Jane L*, the Court said that a district court should avoid the "understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must be unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." *Jane L. v. Bangerter*, 61 F.3d 1505, 1513 (quoting *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421-422 (1978)). Thus, no fees were awarded against counsel for making a claim in *Jane L* that Utah's abortion law violated the constitutional proscription against involuntary servitude because one judge and a preeminent legal scholar supported such a claim. *Jane L*, at 1514-1515.

What the district court actually did in *Crank* conflicts with the reasoning in *Jane L* because it engaged in post hoc reasoning in using Rule 11 to award fees because one litigant prevailed and the other did not. This is not Utah's Rule 11 standard. Rule 11 is not a fee shifting statute, although the district court in *Crank* apparently used the rule in this fashion to make an award to a prevailing party under the guise of sanctions. This is improper.

All attorneys make plausible arguments based on case precedents and other legitimate sources in the law but nevertheless find themselves on the losing end of a court's decision. The legal profession would be placed in dire straits if hindsight logic became the standard for imposing Rule 11 sanctions.

In civil rights cases, defendants often threaten sanctions in an attempt to intimidate counsel. Rule 11 operates more heavily against controversial lawsuits and lawyers who bring them for poor and underprivileged clients.[2] Judges are in a particularly good position to manipulate and corrupt the judicial process by engaging in threatening conduct. This Court should be vigilant to ensure that an attorney is protected from the abuse of judicial power in making a legitimate claim that the judiciary is involved questionable activities involve issues of race. Sanctions should be a rare exception rather than the usual rule. This principle is especially important for the future enforcement of the rights of Indian jurors in San Juan County now that the Council has announced that it is, once again, violating the Consent Decree by using jury lists which unlawfully exclude Native Americans. See R. 2095-2098.

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[2] Studies have indicated that threats of sanctions operate more heavily against civil rights litigants. Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189, 200-201 (1988); Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, 69 (1989), cited in Burbank, The Transformation of American Civil Procedure: The Example of Rule 11, 137 U. Pa. L. Rev. 1925, 1938 (1989); Comments on Rule 11 of the Federal Rule, NAACP Legal Defense and Education Fund, Inc. (1991) (Submitted to the Committee on Rules and Practice of the Judicial Conference of the United States).

**POINT TWO**

**There is no basis for sanctions under Rule 11(b)(1).**

**(a) Counsel's purpose is apparent from the record. The district court misconstrues this record. Its decision is therefore clearly erroneous.**

Rule 11(b)(1) is violated if an action is "...for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation." In his original motion for sanctions, Judge Anderson submitted no evidence establishing counsel's improper purpose, see, Motion, R. 1001-1029; Consolidated Reply, R. 1059-1079, other than providing materials relating to the *Estrada* case. *Estrada* has no bearing on the question of motive, as argued, *infra*. Thus, it is clear that an improper purpose, if any there be, can only be imputed to counsel from other portions of the record.

Counsel's legitimate purpose is apparent from the record, particularly the lengthy pattern of discrimination against Native American jurors evident in San Juan County's jury selection history. An attorney whose purpose is to stop this discrimination is properly motivated. Properly addressing the exclusion of Native Americans from jury service has always been counsel's motive. The district court's presumption that the record reveals an improper motive, a motive supposedly confirmed by the taking of an appeal, is an inaccurate characterization of the record. This construction of the meaning of the record constitutes clear error.

Counsel's purpose is proper and apparent from the record:

Native Americans were grossly under represented on jury

lists in recent times, indeed, for most of this last century, American Indians were not present in jury pools at all. See R. 657 (Exhibit A to Agreement) (1932-1996); R. 1258-1264 (1997-1998). They are still being improperly excluded in 2002. R. 2095-2098.

- Although a Seventh District judge found the jury system to be discriminatory in 1974 and issued a writ of habeas corpus in a criminal case, Keith v. Smith, R. 148--238a-240a, the exclusion of Native Americans continued. Crank was filed in 1993 to address this continuing problem.

- The representatives of Utah's judiciary, the Utah Judicial Council, and the Seventh District Judges, including Judge Anderson, entered into a Consent Agreement with Mr. Crank, R. 648, et. *seq.*, Consent Decree and permanent injunction, R. 678, et. *seq.*, agreeing to reforms which would grant Native Americans equality in jury selection. Id.; see, e.g., R. 652-654 (Agreement, ¶ 4). Native American jurors were accorded class status, R. 650-652, and the trial court retained jurisdiction to oversee compliance with the Court's mandate. R. 656 (Agreement); R. 679 (Consent Decree). This background provides counsel with a motive for what he did, since with the filing of the Consent Decree he had a continuing obligation to monitor and enforce the Agreement on behalf of the class. See *Duran* v. *Carruthers*, 885 F.2d 1492, 1495-1496 (10th Cir. 1989).

- In less than a year, the Council broke its promise by creating jury lists which excluded Native Americans in violation of the Agreement. In order to implement the violation, a judge had to

assist the Council by actually using the lists. Using the lists and thereby completing the jury selection process would effectively lock out those Native Americans who should have been on the lists. The person who performed this role was the Seventh District Judge who was operating and managing the jury selection system on the district court level, Judge Lyle R. Anderson. It was Judge Anderson's acts and omissions while engaged in this process that aided and abetted the Council in violating the court order. There were facts supporting the judge's culpable role which were apparent to counsel. See Point Four, *infra*. Enforcement proceedings were required in order to make Utah's judiciary live up to its word. Contempt proceedings were also brought against the only district court judge who was using the deficient jury lists, operating and managing the jury selection system for the Council on the district court level, including qualifying and disqualifying individual jurors, assisting the Council in implementing and monitoring the jury system and its compliance with the Agreement, and, in 1997 and 1998, implemented the Council's violation of the court order by aiding and abetting the Council's violations by using bad jury lists. Id.

It was the use of the bad lists excluding Native Americans that was at the center of the controversy. If the lists had not been used, this action would not have occurred. There was an easy, quick and inexpensive method of revising the lists to bring them up to the required percentages of Native Americans. This process is known as supplemental sampling. Supplemental sampling is a

mathematical procedure known to the Council and Judge Anderson which proportionally samples the population from each census division in San Juan County to come up with lists that reflect a cross section of the population of the county. R. 724 (Dr. J. Dennis Willigan Sixth Affidavit, Page 5, ¶ 14). The Council had a staff employee who could have easily undertaken this procedure. So did plaintiff; indeed, plaintiff unsuccessfully tried to volunteer his expert at no charge for this work. Supplemental sampling was never used. Eventually, the Council, through its attorney, admitted that this was a proper and efficacious process. R. 1600, Pages 17-19. Despite the ready availability of a quick and easy fix, the lists, which were documented to a mathematical certainly to have excluded specific, significant numbers of Native Americans, were used anyway.

The district court based its decision to impose sanctions on counsel's taking of the appeal regarding the Judge Anderson claims. R. 2067-2069. The sanctions were accordingly limited to some of the judge's fees on appeal and post-appeal. R. 2069. There is a perfectly good reason why an appeal was taken over the dismissal of the Judge Anderson claim while not pursuing contempt charges against the Judicial Council.

This Court commented that plaintiff's action compelled the Council to now take its obligations seriously: "[i]n this case, it seems likely that Crank's second suit has instilled a certain heightened degree of circumspectness in the Council's adherence to the procedural details of the Agreement." *Crank I*, 20 P.3d 307, ¶

38, 317, n.14. As was the case with the Council, counsel's motive in regards to Judge Anderson was to make the judge take discrimination against Native American jurors seriously as well.

It is evident from the record that the right of Native Americans to be on jury lists in certain numbers is something that Judge Anderson never took seriously. This prompted the action against him. The judge felt he could ignore the minimum standards for inclusion of Native Americans on jury lists by using lists that contained insufficient numbers of Indian jurors.

The judge's use of the bad lists was documented in one criminal case in the Seventh District and provided an example of exactly how he aided and abetted the Council in the use of lists which improperly excluded Native Americans, *State v. Estrada*. There, Judge Anderson was apprised that the jury lists did not have the minimum numbers of Indian jurors required by the Agreement and should not be used. The lists excluded approximately 148-168 Native Americans who were supposed to be on the lists in 1997, R. 1260, and approximately 132-155 Native Americans who were supposed to be on the lists in 1990. R. 1263.

Judge Anderson was asked to strike the lists and not use them. He refused. R. 694-696; R. 776-783; see also R. 1602, Page 60. Judge Anderson made it clear that the numbers on the lists were acceptable because he was not bound by the standards of the Consent Decree, R. 696, and in fact would not use the Agreement's criteria for inclusion of Indian jurors. R. 1602, Pages 59-60. Judge Anderson's actions established two conflicting standards, one for

the judiciary's administrative body that prepare the lists for his use and the other standard applicable only to himself as the only judge using the lists in San Juan County jury trials during 1997 and 1998. That Judge Anderson in his cases took this double standard to heart by adopting a lesser standard (and, therefore, lesser numbers of Indian jurors) than the Judicial Council had obligated Utah's judiciary to use threatened the right of Native Americans to participate fairly in the jury selection process.

Counsel's purpose in the action against Judge Anderson and in taking the first appeal was to protect Native American jurors by preventing the judge from legitimizing lesser numbers of Indians on jury lists and thereby set himself apart from the standard requiring larger numbers of Indian jurors that was agreed to for the Seventh District. See Appellant's Opening Brief, Crank I., Pages 8-9; 31-34; Appellant's Reply Brief, *Crank I*,, Pages 11-14.

The district court held that counsel's improper purpose is established by his use of the *Estrada* case. R. 2066-2067. *Estrada* is not indicative of motive. *Estrada* is not probative of an improper purpose since the case was only used to demonstrated how the judge aided and abetted the Council's violation of the Agreement. Moreover, the *Estrada* case was in the record when Judge Roth considered sanctions, and it can be assumed that he considered and rejected the argument that an improper motive was the reason that this case was being used.

Counsel's purpose is thus proper in every respect because it stems from the continuing cycle of diminished presence of Native

Americans on the jury lists that, despite notice and the ready availability of an easy fix, bespeaks of purposeful discrimination. That the conduct continued once all concerned were on notice was an aggravating factor the Court could take into account in imposing contempt sanctions. This continuing pattern of exclusion of Native American jurors and the judge's role in that exclusion was termed flagrantly racist. Although this language was repeatedly referenced by the district court in its ruling imposing sanctions, it was an appropriate means of describing the judge's conduct that persisted despite notice that it was wrong.

A person who continues unlawful conduct, such as the continued use of the bad jury lists after having been placed on notice, is committing wilful and egregious acts. The record bears this out. See R. 692-693 (notice to Judge Anderson); 685-688; 690-692 (continued use of lists while Judge Anderson was acting in privity with the Judicial Council); R. 694-696 (Judge Anderson's refusal to take corrective action despite being placed on notice). Counsel's research disclosed law that held that continuing wrongful acts after having been placed on notice bespeaks of intentional racial discrimination as a matter of law. See Appellant's Reply Brief, *Crank I*, Pages 16-17. That judge's continuing conduct after having been placed on notice constitutes wilful racial discrimination as a factual finding was attested to by an expert in an affidavit. Dr. J. Dennis Willigan Seventh Affidavit, R. 1146-1148, ¶ 49, Pages 23-25. This accounts for the characterization that the judge's conduct was flagrantly racist. Thus, counsel's statement about

flagrantly racist conduct does not indicate any improper purpose because it was made in the context of the judge's overall participation in institutionalized racism.

By the time the enforcement and contempt motion was filed in September, 1997, Judge Anderson had conducted 10 jury trials involving defendants, including some Native Americans, who were unaware that the jury lists were fundamentally defective because they improperly excluded Indian jurors. R. 690-691. More trials had been scheduled. R. 691. The violation of the Agreement by the Council was assisted by and clearly aggravated by the sustained use of the discriminatory lists by Judge Andersons in his operation and management of San Juan's jury system on the district court level.

Counsel's purpose in taking action against the judge is thus apparent from the record. Counsel had an eye to the future when dealing with the problem of the judge adopting a lesser standard for inclusion of Native Americans on jury lists while using deficient lists. Counsel was motivated to correct the problem before it became a problem in the future. That counsel's purpose is proper in every respect is borne out by recent events where the Council provided notice that its jury lists are, once again, in violation of the Agreement. R. 2095-2097. Lists with deficient numbers of Native Americans are now being used by Judges in the Seventh District Court for San Juan County, including Judge Anderson. Thus, the cycle of discrimination that motivated counsel years ago remains all too real in the present.

**(b) The district court's opinion conflicts with prior rulings that counsel had a proper purpose. The use of Rule 11(b)(1) violated the mandate of this Court in *Crank I*.**

There is nothing in the record that documents counsel's alleged improper purpose. See Point 2(a), *supra*. However, there are rulings by the district court, affirmed by this Court, which held that counsel's purpose was proper. The district court was obligated to not only give great weight to these rulings but to be bound by them as well. That the district court ignore the effect of these rulings constitutes clear error.

The district court, Judge Roth, found that counsel had no improper purpose. This Court upheld this finding. *Crank I*, 20 P.2d 307, 316, ¶ 32. That counsel had a proper purpose throughout the case at the trial level is supported by Judge Roth's expression of his feelings in talking to the attorneys as he announced his decision from the bench at the end of the trial:

> The first thing I would like to say is that in my opinion from what I have seen of this case and during these last two days, I believe that on both sides of this case the parties are properly motivated and well intentioned. Both trying to solve a similar problem but doing it in different ways from different prospective. And while I agree and disagree with both of you to some extent, I don't see any villains in this courtroom. R. 1645, Page 395.

The pronouncement of an experienced trial judge who had been in this case for five years and had first-hand exposure to the evidence and contentions of the lawyers, expressed some five months after the denial of sanctions, where he could find nothing bad to say about anyone, and was only complimentary, should have been given great weight by the district court. Indeed, a ruling of a

proper purpose by the district court that is affirmed by this Court is the law of the case. *Cf., Madsen v. Borthick*, 769 P.2d 245, 250 (Utah 1988). This failure to abide by these favorable rulings is a conclusion of law and must be reviewed by this Court without giving any deference to the trial court. *Morse v. Packer*, 973 P.2d 422, 424-425, ¶ 12. The sanctions are in error and must therefore be overturned under the correction of error standard. Id.

The district court's ruling also violates the remand mandate of this Court. The district court on remand must follow the mandate of the appellate court. See Rule 30, Ut. R. App. P. This Court ordered the district court to make determinations regarding only violations of Rules 11(b)(2)-(3). Rule 11(b)(1) was not included in the mandate. See *Crank I*, 20 P.3d 307, 316, ¶ 34; 319, ¶ 44. The reason for this is that Judge Roth, and then this Court in *Crank I*, had disposed of all Rule 11(b)(1) issues by finding that counsel acted in good faith. This Court never even hinted that Rule 11(b)(1) may be the basis for sanctions, see Point One, *supra*, or that this provision could in any other way be used on remand.

True, but does that mean the dist. ct. can't review it?

**POINT THREE**

**Rule 11(b)(2) is not a valid basis for sanctions because the claims were viable, based on Utah law or the law from other jurisdictions. Counsel also had a plausible argument based on objectively reasonable research of claims that were an extension, modification or reversal of existing law or the making of new law.**

Rule 11(b)(2) states "...the claims, defenses and other legal contentions therein are warranted by existing law or by a non

frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." This places the legal viability of the claims against Judge Anderson at issue. There were three claims: (1) that Judge Anderson aided and abetted the Council in its violation of the Consent Decree; (2) that Judge Anderson violated the Consent Decree's provision regarding inclusion of Native Americans in the jury lists, set out in ¶ 4 of the Agreement and (3), that Judge Anderson violated the provision regarding compliance with the constitution, laws and regulations, ¶ 8 of the Agreement. Judge Roth addressed the last two claims, ruling that there was no cause of action for violation of the Agreement. R. 1185-1189 (order); R. 1600, Pages 3-8 (ruling from bench). Judge Roth focused only on the question of the legal sufficiency of the claim and did not address the factual allegations. This Court ruled on claims involving the alleged violation of the Agreement. *Crank I*, 20 P.3d 307, 314-315.

Counsel's primary claim is that Judge Anderson, as a non-party, aided and abetted the Council in its violation of the consent decree. The elements of this claim are:

a. A non-party is acting in concert with and in privity with a party to a court order;

b. The non-party has notice of the order.

c. A party to the court order is violating the order.

d. The non-party is aware that the party is violating the order.

e. The non-party acts or fails to act with the purpose of

aiding and abetting the party in its violation of the Order.

In order to bring the aiding and abetting claim, an important aspect of the theory that counsel had to substantiate is whether a non-party can be held in contempt for a violation of a court's order. Research revealed that there is a claim that can be made against a non-party for aiding and abetting a person or entity who violates a court order. This principle is universally recognized by many jurisdictions. Despite the universal acceptance of this theory, neither Judge Roth or this Court in *Crank I* ever addressed this claim. This Court may have expressly acknowledged at least part of the aiding and abetting claim by discussing the liability of non-parties in terms of the application of Utah statutes. See argument, *infra*. This Court may also have implicitly acknowledged plaintiff's claim in *Crank I* by discussing claims that plaintiff did not make. Id. In *Crank I*, the Court run together various claims for discussion purposes but only actually ruled that there was no cause of action against the Judge for alleged violations of the Agreement. The district court in turn focused only on the alleged violation of the Agreement. This did not a provide proper basis for sanctions, particularly where the district court failed to even address the aiding and abetting claim. See R. 2057-2069 (ruling).[3] Thus, this ruling mistakenly construes the record. It is a legal conclusion that constitutes clear error. Accordingly, it must be reversed under the correction of error standard of

where is this found?

[3] Judge Anderson also did not address the aiding and abetting claim on remand. R. 1744-1819 (memorandum); R. 2022-2032 (reply memorandum).

review. *Bernard v. Sutliff,* 846 P.2d 1229, 1234-1235.

It is apparent that Judge Anderson's culpability under aiding and abetting principles is an arguable point. Plaintiff claimed that the judge, as a non-party, acted in concert with and in privity with the Judicial Council in aiding and abetting the Council's violations of the Consent Decree. There were facts alleged which support this claim. See Point Four, *infra*.

The right of a court to hold a non-party in contempt for aiding and abetting a party who is violating a court order is well recognized throughout the United States. This considerable body of law was repeatedly referenced in various plaintiff's memoranda. See, e.g., Plaintiff's Opening Supreme Court Brief,*Crank I*, Pages 17-23. In this one brief alone counsel found support for this widely accepted principle of law in an opinion of the United States Supreme Court, three cases from the Tenth Circuit Court of Appeals, a Sixth Circuit opinion, and a Second Circuit case. See Id. Many other federal cases were also cited, including district court cases in Alabama, Pennsylvania and Virginia. These cases are hardly exhaustive of this area of the law. Thus, it can be said that enforcement actions against non-parties who aid and abet a party who is violating a court order involve a legal principle that is black letter law. See also Wright and Miller, Federal Practice & Procedure, Civil 2d, § 2956.

Liability for aiding and abetting a party who violates a court order is therefore a plausible argument. A plausible argument is not frivolous. *Barnard v. Utah State Bar*, 857 P.2d 917, 970 (Utah

1993). Even if the aiding and abetting claim is viewed as a good faith argument to extend, modify, or reverse existing law, the claim complies with Rule 11. See, Rule 11(b); Rule 33(b), Ut. R. App. P. Counsel need only show that his research into the law and facts is "objectively reasonable under all the circumstances." *Taylor v. Hansen*, 958 P.2d 923, 930 (Utah App. 1998) (quoting *Barnard v. Sutliff*, 846 P.2d 1229, 1236). Counsel need not come to the correct conclusion; he need only have made a reasonable inquiry. Id.; see also *Barnard v. Utah State Bar*, 857 P.2d 917, 920; Wright & Miller, Federal Practice & Procedure, Civil 2d, § 1335.

A reasonable inquiry and research by counsel in *Crank* produced a wealth of case law from other jurisdictions, although not in Utah, that supported the legal theory of non-parties being held in contempt for aiding and abetting a party's violation of a court order. Counsel's interpretation of the law at the time of filing was at least plausible. *Barnard v. Utah State Bar*, 857 P.2d 917, 920. Thus, reliance on the case law from many other jurisdictions meets the test that the research was objectively reasonable. The fact that years later the Supreme Court denied liability does not merit the imposition of sanctions. Id. at 920-921.

The language in Utah procedural rules supports enforcement of orders against non-parties:

Rule 65A(d) states:

> an "[injunction] shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon persons in active concert or participation with them who receive notice in person or through counsel, or

otherwise, of the order." (Emphasis supplied).

Relying on the plain meaning of this provision is objectively reasonable.

The Agreement of the Parties has language which arguably runs the reach of the injunction to non-parties:

> The Agreement, ¶ 12, states: "This Agreement of Parties, and any Order of the Court, shall be binding on the heirs, successors, and assigns of the parties hereto, including any courts of general jurisdiction that may succeed the present Seventh District Court For San Juan County." R. 656. (Emphasis supplied).

It was objectively reasonable for counsel to rely on this language.

The Agreement, ¶ 4(a), requires a jury reform plan and bestows discretion to implement the plan on the Council and

> "...those acting for and in its behalf...". (Emphasis supplied).

It was objectively reasonable for counsel to rely on the plain meaning of this language.

The Agreement, ¶ 8, states:

> "Defendant, and all those acting in concert with it, shall, in regards to jury selection procedures and activities in the Seventh Judicial District Court for San Juan County, abide by all applicable laws, regulations, and constitutional provisions." (Emphasis supplied).

It was objectively reasonable for counsel to rely on the plain meaning of this language.

The Agreement, ¶ 13, provides that the court shall retain jurisdiction to enforce compliance with the Agreement. The Agreement refers to "parties" in the plural when dealing with compliance. This can arguably include Judge Anderson because he was a party at the time the settlement was negotiated, as well as

being, through his attorney, a signatory to the Agreement. It was objectively reasonable to rely on this as well.

The Consent Decree also has language which arguably implicates non-parties:

The Consent Decree, ¶ 3, states:

> "The Defendant Utah Judicial Council, its agents, officers, successors and all persons acting in concert or participating with it, are hereby ordered to comply with the provisions of the Agreement of Parties." R. 679. (Emphasis supplied).

It was objectively reasonable for counsel to rely on the plain meaning of these documents in formulating a theory of the case, especially where the language so closely follows the provisions of Rule 65.

Although both Judge Roth and the Supreme Court focused on an interpretation of the parties' Agreement in holding that plaintiff's claims failed, the language of the Agreement and Consent Decree was not the only legal theory and claim used by plaintiff. It was reasonable for counsel to use the many cases applying the process of enforcing court orders against non-parties which are found in the jurisprudence of other jurisdictions throughout the United States. This is appropriate where there is no Utah case law on the point. Where there is no Utah case law but there is law from other jurisdictions, sanctions are inappropriate. *Utah State Bar v. Sorensen*, 910 P.2d 1227, 1228 (Utah 1996) ("In view of all the facts and the uncertainty as to the state of the law in this area, we cannot hold that the trial court was required to find that the conduct of the Bar or its legal counsel fell below the standard set in Rule 11."). Counsel's argument, backed by a

reasonable inquiry in the form of research that produced case law of other jurisdictions, demonstrates that Rule 11 was not violated.

Most telling, the Supreme Court on appeal in *Crank* implicitly acknowledged the validity of plaintiff's legal theory that non-parties can be held in contempt of court. The Court said, "Clearly, a trial court has the power to hold non-parties in contempt if those parties conspire to frustrate a lawful order of the Court." *Crank I*, 20 P.3d 307, 314, ¶ 25. The Court arrived at this conclusion by using existing Utah statutory law, Utah Code Ann. § 78-32-1(9) (unlawful interference with process or proceedings of court); Utah Code Ann. § 78-32-1(5) (disobedience of lawful judgment or order), but did not actually refer to the aiding and abetting claim. In discussing the sufficiency of the factual allegations regarding what this Court thought was an allegation of an interference with the Agreement, *Crank I*, 20 P.3d 307, ¶ 29, the Court again implicitly acknowledged, in a general way, the basis for plaintiff's claim, referring to it this time as a conspiracy theory. Id. at 315, ¶ 30. This supports plaintiff's argument that no violation of Rule 11(b)(2) occurred because the claims were based on existing Utah law.

The Supreme Court's implicit acknowledgement in *Crank* of the basic legal theory and principle underpinning claims against non-parties negates any basis for sanctions under Rule 11(b)(2) because the claim is warranted under proper construction of existing Utah law. See *Crank I*, 20 P.3d 307, 314, ¶¶ 24-25. Rule 11(b)(2) is also complied with because plaintiff's theory, if it does not come

within the statutory language used by this Court, amounts to a good faith argument for the extension of the law or even the making of new law. This is perfectly in line with the cases from other jurisdictions which apply the aiding and abetting principle. See, e.g., *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14-15 (1945); *International Brotherhood of Teamsters, etc. v. Keystone Freight Lines, Inc.*, 123 F.2d 326, 329 (10th Cir. 1941).

The foregoing research and plain meaning of language in the settlement documents and orders is in contrast with the district court's ruling that Rule 11(b)(2) was violated because counsel never made an argument to extend, modify or reverse the law or establish new law. R. 2067. The Court's conclusion is apparently based on the ruling that counsel made only one claim, a claim that the judge had violated the Agreement which contained no duty applicable to the judge. Counsel made the claim that Judge Anderson, while in privity with and acting in concert with the Council, aided and abetted the Council in its violation of a court order. This claim was not based, as the district court incorrectly assumed, on what Judge Anderson could or could not do in complying with or abiding by the Agreement. It was based on what the judge did do or did not do that aided and abetted the Council. This Court reviews the district court's legal conclusions under a correction of error standard. *Barnard v. Sutliff*, 846 P.2d 1229, 1234-1235. No deference is given to the trial court's conclusions of law. *Morse v. Packer*, 973 P.2d 422-425, 424, ¶ 12. The district court's failure to take into account a particular claim and the

legal theory and supporting case law underlying this claim constitutes clear error on a question of law. The decision based on clear error should be overturned. See Id.

**POINT FOUR**

**Rule 11(b)(3) is not a basis for sanctions because the claims had proper evidentiary support. Sanctions cannot be imposed where counsel was not provided with timely notice and an opportunity to cure the alleged factual inconsistencies.**

Rule 11(b)(3) requires "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." The district court imposed sanctions based on insufficient factual allegations and in so doing relied on language in this Court's opinion in *Crank I*. R. 2068.

Judge Anderson in his initial trial motion never provided notice that he was seeking sanctions for deficient factual allegations. See R. 1001-1029, 1059-1079 (Motion For Sanctions, Memoranda); R. 763-788 (Motion to Strike, Memorandum). He relied only on Rule 11(b)(1) (improper purpose) and Rule 11(b)(2) (claims must be warranted by existing law, etc.). Neither counsel nor the trial court were apprised of any claim regarding the sufficiency of the facts under Rule 11(b) (3).

Judge Roth never addressed a sufficiency of the evidence allegation in the motions to strike and for sanctions when ruling from the bench. See Order, R. 1185-1189. Rather, Judge Roth limited his decision on the Motion to Strike to a construction of

the Agreement of Parties and his ruling on the sanctions motion to counsel's good faith. Id.

Rule 11(c) requires that any motion for sanctions "describe the specific conduct alleged to violate subdivision (b)." On appeal Judge Anderson for the first time raised the issue of the facts in *Crank I*. Plaintiff complained about Judge Anderson's attempt to improperly supplement the record on appeal with new facts. Footnote 1, *supra;* see also Appellant's Reply Brief, *Crank I*, Pages 1-4. This gave counsel no opportunity to address the question on the trial level by curing the alleged defects or withdrawing the pleading. Under such circumstances, courts are reluctant to allow new issues to be raised for the first time on appeal. See *State v. Anderson*, 789 P.2d 27, 29 (Utah 1990) (court cannot consider new arguments made for the first time on appeal). Because the question of the sufficiency of the factual allegations was not presented with the specificity required under Rule 11(c), Rule 11(b)(3) is not an appropriate basis for sanctions.

In addition, the failure at the outset to provide notice of alleged insufficient pleading of the facts raises serious due process concerns that counsel was not afforded a fair opportunity in the district court to respond or cure the alleged defects. Wright & Miller, Federal Practice and Procedure, Civil 2d, § 1337; see also *Hutchinson v. Pfeil,* 208 F.3d 1180, 1184 (10th Cir. 2000). Following appeal on remand it was, of course, too late to cure the alleged factual insufficiencies and change the record. Imposing penalties well after the time when the alleged factual deficiencies

could have been properly addressed at the outset if proper notice had been given also does not square with this Court's ruling that due process and the opportunity to be heard are mandatory when sanctions may be imposed. *Crank I,* 20 P.3d 307, 314, ¶¶ 25-27. It also does not square with the rule that more stringent due process standards may become applicable where, as seen in *Crank* on remand, the sanctions move from compensatory to the punitive end of Rule 11's spectrum, as was the case in *Crank*, see Point One, *supra;* Wright & Miller, Federal Practice and Procedure, Civil 2d, § 1336.

The Court in *Crank* said that there were no concrete allegations that the judge conspired with the Council or that he hampered the Council's compliance efforts. *Crank I,* 20 P.3d 307, 315, ¶ 29. The Court also said that the motion instituting the action against Judge Anderson "...did not provide any sworn facts that indicated a violation of the Agreement or an attempt to interfere with its implementation." Id. at 315, ¶ 29. These pronouncements pertained to claims that plaintiff never made (i.e., hampering and interfering).[4] The decision mentioned conspiracy, also a claim that was never made.[5] Despite the fact that counsel

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[4] Interference with a court order may be a contempt of court. see, e.g., *United States v. Shipp*, 203 U.S. 563, 575 (1906). However, it was never alleged that the judge sought to interfere with the Council's compliance with the court order.

[5] A conspiracy between the Council and the Judge was never alleged, nor is it essential to the claim that the Council violated a court order and that the judge helped them do it. A conspiracy alleged under 42 U.S.C. § 1983 requires an agreement or some understanding between a private party and a state actor to deprive someone of a constitutional right under color of state law. See, e.g., *Dixon v. City of Lawton, Okl.*, 898 F.2d 1443, 1449 n. 6 (10th Cir. 1990). *Crank* is a Section 1983 case and the use of the term

never made such claims, the district court parroted this Court's language, imposing sanctions because there were no facts supporting a claim of interfering or hampering. R. 2068. *Crank I*'s pronouncements about claims that counsel never made were unnecessary to the Court's ruling on the substantive issues and should therefore be viewed as *dicta*. See *Callahan v. Salt Lake City*, 125 P. 863, 864-865 (1912); *OXY USA, Inc. v. Babbitt*, 230 F.3d 1178, 1184-1185 (10th Cir. 2000). To the extent this Court led the district court astray by steering it to consider the issue of factual allegations outside the context of claims actually made, this Court should set matters straight and not allow sanctions to be imposed.

What little was said in *Crank I* about the facts did involve a claim plaintiff did make about an alleged violation of the Agreement. Although this Court in *Crank I* found that the factual allegations were not concrete. it did not say that no facts were alleged at all. The Court's pronouncements about the facts did not specifically mention the aiding and abetting claim. Nor did the Court identify and discuss the specific facts alleged in sworn pleadings and affidavits as they bear on the aiding and abetting claim. There are specific facts supporting this claim, as argued, *infra*. Under these circumstances, it was clear error for the district court to rely on this Court's pronouncements as a basis for sanctions.

Plaintiff's allegations were supported by affidavits of

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"conspiracy" to describe plaintiff's claims is misleading.

witnesses attesting to first-hand knowledge of facts, including facts and opinions by plaintiff's experts. This factual showing is quite detailed. In addition to the arguments and facts made directly about Judge Anderson, additional issues and facts were raised about the Council which also implicated Judge Anderson. This certainly illustrates that counsel was carefully dealing with the facts as they relate to his legal theory of the case.

This is not a case where allegations were made with no evidentiary support at all. Far from it. The district court did not consider or give any weight at all to the following factual allegations that supported plaintiff's aiding and abetting claim and that the Agreement had been violated:

- The Motion For Order to Show Cause, R. 684-725. The Motion is Verified. At the very outset, the motion clearly states that its objective is to appoint a receiver to implement the Agreement, obtain an order enforcing the Agreement, and requests an Order to Show Cause for contempt sanctions for violating or aiding and abetting the violation of the Agreement and Consent Decree. The Motion describes the Agreement and background of the case and depicts the role of the Judicial Council and Judge Anderson and alleges that they are in privity and acting in concert. Id. at Page 2. The requirement of the Agreement that Native Americans are to be included in certain numbers and the jury selection process are described in detail. Id. at Pages 3-5. The deficient numbers of Native Americans on the 1997 lists are described and documented in detail in terms of actual numbers and by the use of percentages,

called disparities. Id. at Pages 5-7. Affidavits of experts provide additional documentation for these verified allegations. See Seventh Affidavit of Irene Black and Sixth Affidavit of Dr. J. Dennis Willigan. Verified allegations further state that there were 10 jury trials conducted by Judge Anderson in 1997, identified by case name and docket number. Motion, Pages 7-8. Fourteen additional jury trials for 1997 to be conducted by Judge Anderson were identified as upcoming, Id. at Pages 8-9. Notice of the deficient jury lists was provided to the Council and Judge Anderson. Id. at Pages 9-10. Conversely, notice of the violations to the Court required under the Agreement was not provided. Id. at Page 12. Despite notice having been given by plaintiff, the violations continue. Id. at Pages 10-11. The verified allegations then specify the facts of Judge Anderson's aiding and abetting the Council's violations. Id. at Pages 11-12. These include using the lists; concluding the jury process with jury trials and other procedures which permanently locked out the Native Americans who should have been on the lists but were not; failing to provide notice and warning to those involved in the jury selection process, including parties and their attorneys in pending cases and the jurors in the class in *Crank* and class counsel; renouncing the Agreement and refusing to apply the Agreement's standards during the qualification and trial process; and by intentionally discriminating against Native American jurors. The verified allegations further document, through plaintiff's expert, Dr. J. Dennis Willigan, that fixing the lists and curing the violations

can be done quickly and inexpensively. Id. at Page 12; see also Dr. J. Dennis Willigan Affidavit, ¶ 14. Notwithstanding the availability of easy means to fix the problem, the Council and Judge Anderson did not employ any of them, or any other. Id. at Page 12. The plaintiff documents reasonable but unsuccessful efforts to resolve the alleged violations. Id. at 12. The Motion details the relief requested, including setting the matter for hearing; entering preliminary and permanent injunctive relief; appointing a receiver to implement compliance; issuing an Order to Show Cause for Contempt; the imposition of standard contempt sanctions, including fines, jail sentences and damage awards to the class; and awarding plaintiff his fees and costs. Id. at Pages 13-14.

- Motion's Supporting Memorandum, R. 726-740. The memorandum discusses the facts in detail. Memorandum, at Pages 1-5. Previous documentation is incorporated which bears on the current controversy, including Dr. Willigan's Third and Fourth Affidavits. Id. at Page 4. In the Statement of Law, the Court's enforcement authority is discussed. Id. at Pages 5-7. The Memorandum discusses the duties of the Council and Judge Anderson. Id. at Pages 7-8. The Memorandum provides authority regarding enforcement and contempt against non-parties who are in privity and in concert with parties while aiding and abetting violations of court orders. Id. at Pages 7-9. The violations are then discussed in more detail. Id. at Pages 10-13. The remedies sought by plaintiff are set forth. Id. at Pages 13-14.

- Plaintiff's Reply Memorandum in Support of Motion For Order to Show Cause, R. 1100-1154. The Council submitted a Response to the Verified Motion which included affidavits from Judge Anderson and an attorney with the Court Administrator's Office, Brent Johnson. See Council's Response, R. 796-861. The Reply includes Dr. Willigan's twenty seven page Seventh Affidavit. Dr. Willigan provides considerable detail in refuting the allegations made by Judge Anderson and Attorney Johnson. Dr. Willigan's findings, as an expert sociologist, include the observation that given the statistical data that presents clear statistical evidence that racial bias is present and which documents the under representation of Native American jurors which placed those in the jury selection process on notice, with those responsible having deliberately chosen to not utilize "a readily available, cost-effective solution (e.g., supplemental sampling) to promptly remove the racial bias, but rather opt for an alternative solution that offers no immediate relief, taking years to implement, and which rests on an administrative foundation which is characterized by it's proponents as '...not likely [to] be easily maintained,' a sociologist such as myself would normally be led, *ceteris paribus,* to report evidence supporting a finding of intentional racial discrimination." See Affidavit, Pages 23-25. Thus, an expert, upon carefully analyzing the evidence and data, including facts implicating Judge Anderson, found racial discrimination. The Memorandum further discusses the facts and violations. Memorandum, at Pages 1-5. The facts underlying

defenses asserted, including good faith, attempts to fix the deficient lists, and other matters, including questionable claims and allegations by Attorney Johnson, are thoroughly refuted. Id. at Pages 5-11. In addition, false and misleading statements by the judge and attorney are discussed in light of Dr. Williganʼs work. Id. at Pages 11-14. In regards to evidence presented by the Council, through Judge Anderson, that it is in compliance for the year 1998, plaintiff provided a thorough refutation of this allegation. Id. at 14-16. The Memorandum further discusses plaintiffʼs allegations of constitutional violations which are brought into the Motion because compliance with the Constitution is mandated by the Agreement, ¶ 8. Id. at Pages 16-20. Judge Andersonʼs role in jury selection is discussed. Id. at Pages 20-21. Remedies sought by plaintiff are identified, including mandating supplemental sampling to immediately resolve the problems. Id. at Pages 21-22. In addition, a transcript of portions of the *Estrada* case are provided in support of the allegations implicating Judge Anderson. Id. at Exhibit B.

- Dr. Williganʼ submitted an eighth affidavit. R. 1215-1253. This affidavit documents the continued exclusion of Native Americans from the jury lists in 1998, confirming that 132-155 Indian jurors were not included on the lists. Id. at Page 4, ¶ 15. Dr. Williganʼ provides additional demographic data which bears on the alleged violations. Id. at Pages 5-6 and provides an opinion that the presence of Indian jurors has been "substantially diminished." Id. at Page 6, ¶ 18.

- Expert Reports. Dr. Willigan submitted an expert report and a supplement to that report. The Council through its expert, Mr. Hachman, submitted a report. Both experts testified at trial. Both experts discussed the facts in detail.

- Plaintiff's Amended Motion. R. 1256-1307. Documentation submitted with the Amended Motion included the Affidavit of David Bancroft, further documenting the numbers of Native Americans on the jury lists; the Eighth Affidavit of Dr. Willigan; and August 14, 1998 Hearing Transcript. The Motion asked, *inter alia,* that the Court construe the Agreement and/or amend the Consent Decree to address the conflicting jury list standards created by Judge Anderson's ruling in the *Estrada* case. Motion, at Pages 15-16.

- The Council filed a Motion to Strike Dr. Willigan's Seventh Affidavit. R. 1157-1158 (motion); R. 1159-1164 (memorandum). Plaintiff responded. R. 1165-1178 (memorandum). Plaintiff's Response discussed the basis for Dr. Willigan' work in detail and its admissability. There was no ruling on this Motion.

- The Council filed a Motion for Protective Order requesting that plaintiff be denied discovery. R. 789-793. Plaintiff responded. R. 1086-1099. The facts and the need for additional fact finding were discussed. Discovery was eventually allowed, but did not include Judge Anderson. E.g., R. 1344-1345 (stipulation extending discovery).

- Partial Summary Judgment Motion on Plaintiff's Amended Motion, Memorandum. R. 1364-1366 (Motion); R. 1367-1430 (Memorandum). Attachments included the Court Docket Index; Brent

Johnson Deposition Transcript; Affidavit of Attorney Swenson; August 14, 1998 Hearing Transcript; and the Council's Judicial Protocol. Judge Anderson's continuing role in the alleged violations is discussed in plaintiff's supporting memorandum, at Pages 22-24.

- Stipulation. R. 1445-1446. The parties entered into a stipulation. The parties stipulated to the numbers of Native Americans on the 1997 and 1998 jury lists. The Council admitted it did not file annual reports. The Council admitted that it did not request from the trial court an extension of time in which to come into compliance with the Agreement. The Council admitted that it did not employ supplemental sampling in 1997 and 1998.

- Plaintiff took the depositions of Attorney Johnson and a computer specialist with the Court Administrator's Office, Mr. Yoshinaga. Both deponents discussed the facts at length, including facts which implicated Judge Anderson.

The foregoing is illustrative, although not exhaustive, of the role the facts played in this litigation. This was ignored by the district court in imposing sanctions. The district court's ruling is essentially a legal conclusion because it construes and interprets the pleadings and other documents in the record. It should be reviewed for legal correctness, giving the court no deference. *Morse v. Packer,* 973 P.2d 422, 424-425, ¶ 12. Under this standard, the district court's gross misconstruction and misinterpretation of the facts in the record is clear error.

Despite the considerable detailed factual allegations that

were often fact-specific to Judge Anderson's alleged role in aiding and abetting the violations, it is significant, and troubling in light of the sanctions that were imposed much later in the case, that Judge Anderson never timely raised the question of the sufficiency of facts. There are procedural devices to do so.[6] Rather than do this, Judge Anderson did exactly the opposite. He filed a Motion to Strike which admitted the facts.[7] Given Judge Anderson's admission of the allegations, it is understandable that he would not then turn around and challenge the facts or attempt to introduce evidence.

It is also understandable that plaintiff's counsel would not address factual insufficiencies, other than to point out, in the context of the Motion to Strike, that it is an inappropriate remedy to resolve factual issues that may be at issue in a case where the facts are so abundant, detailed and very specific as to key issues. See Plaintiff's Opening Supreme Court Brief, *Crank I*, Pages 28-30. The judge's failure to address this issue up front now places counsel in the difficult position of having had to deal with the question well after the fact without having been afforded the chance to be heard or to take action to cure the alleged

---

[6] See Rule 12(e) (motion for more definite statement); Rule 56 (summary judgment). If there was a question about the sufficiency of the facts, the trial court would have afforded plaintiff a chance to amend the factual allegations. *Sawyer v. County of Creek*, 908 F.2d 663, 665-666 (10th Cir. 1990).

[7] See Wright & Miller, Federal Practice & Procedure: Civil 2d, § 1380; *Kelly v. Kosuga*, 358 U.S. 516, 516 (1959); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F.Supp. 1362, 1395 (D.C.Minn. 1997).

deficiency. As argued, *supra*, this is contrary to the process set out in Rule 11(c) which requires notice, with specificity. It is also raises grave due process concerns. Given the important role that the numerous substantial factual allegations played throughout this case that were specific to Judge Anderson, it was clear error for the district court to misconstrue and misinterpret the record in levying sanctions for insufficient factual allegations under Rule 11(b)(3).

## CONCLUSION

This Court should reverse the judgment and order of the trial court and remand the matter to the trial court for a dismissal of all claims against Attorney Swenson.

Dated this 9th day of July, 2002.

Eric P. Swenson

Appellant

## CERTIFICATE OF SERVICE

Eric P. Swenson, Appellant, hereby certifies that he did mail two true and correct copies of the foregoing Brief to the attorneys for Appellee, as follows: to the attorneys for Judge Anderson, Robert L. Anderson and Daniel G. Anderson, Anderson and Anderson, P.O. Box 275, Monticello, Utah, 84535, this 9th day of July, 2002.

Eric P. Swenson

Appellant

## ADDENDUM

Exhibit 1, Agreement

Exhibit 2, Decree

Exhibit 3, Ruling

Exhibit 4, Rule 11

# ADDENDUM

Exhibit 1, Agreement

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Attorneys for Plaintiff



IN THE SEVENTH JUDICIAL DISTRICT COURT, SAN JUAN COUNTY

STATE OF UTAH

| | |
|---|---|
| LOREN CRANK, JR., Plaintiff, | AGREEMENT OF THE PARTIES |
| v. | |
| UTAH JUDICIAL COUNCIL, Defendant. | Civil No. 9307-26<br>Judge Roth |

The parties desire to settle this litigation by entering into this agreement. It is therefore agreed and stipulated as follows:

1. This is an action brought pursuant to 42 U.S.C. § 1983 alleging that the Defendant and others acting in concert with the Defendant have committed acts and omissions which have resulted in the improper exclusion of Native American jurors in the District Court for San Juan County, Utah. Plaintiff maintains that these acts and omissions violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, comparable provisions

of the Utah Constitution, and applicable laws and regulations of the State of Utah. Defendant denies these allegations. There is a real and actual controversy between the parties in connection with such matters. This Court has jurisdiction over this action and the parties hereto.

2. The following constitute agreed facts:

a. Mr. Crank is an adult Native American resident of Montezuma Creek, San Juan County, Utah, and an enrolled member of the Navajo Tribe of Indians.

b. Navajo, Paiute, and Ute Native Americans in San Juan County constitute a cognizable group.

c. Native Americans have been represented on jury lists used in and for the Seventh Judicial District Court in the numbers and in the disparities listed in the documents attached to this Order, Judgment, and Decree as Exhibit A.

d. The following definitions are incorporated into this Agreement:

The Master List is the merged juror-source list used by the Utah Judicial Council.

The District Court Questionnaire List is the juror-list for the San Juan County District Court which is sent by the Judicial Council VIA the Court Administrator's Office to the Clerk of Court. The Clerk then sends qualification questionnaires to the persons on that list.

The Qualified List contains those San Juan jurors who are on the Master List and the District Court Questionnaire List and have

been through the qualification process and found to be qualified to serve as trial jurors in the San Juan County District Court.

Trial Juror Venire is the list of San Juan County District Court jurors who are summoned to appear and participate in the jury selection process in individual trials.

Trial Venire is the final list of San Juan County jurors who are selected to serve as trial jurors in a specific case.

The foregoing facts and definitions are admissible only for the purpose of enforcing or modifying this agreement or for the purpose of enforcing or modifying the orders of this Court in this case.

3. This case is maintained as a class action pursuant to Rule 23 (a) & (b)(2) of the Utah Rules of Civil Procedure. The class is so numerous that all of its members cannot be joined herein, there are common questions of law and fact applicable to the class, and the claims of Plaintiff are typical of the claims of the class. Plaintiff has alleged that the Defendant has acted upon grounds generally applicable to the class, which alleged facts, if true, would make appropriate final injunctive relief with respect to the class as a whole. Separate actions by individual members of the class would create a risk of inconsistent adjudications with respect to the individual members of the class and would, in turn, establish incompatible standards of conduct for the Defendant. Plaintiff shall represent a class of present and prospective San Juan County Native American jurors. Notice of this agreement shall be provided to the class as follows:

a. The proposed decree, this agreement, and a statement that any member of the plaintiff class may file a written statement of objections with the Clerk of Court on or before a date set by the Court, which counsel recommend be approximately 45 days after this agreement is filed with the Court, shall be posted within three days after the Court so orders as follows:

(i) Plaintiff shall post the documents at the Navajo Chapter Houses for those units of Navajo local government serving the Utah Portion of the Navajo Reservation. Plaintiff shall also post said documents at a suitable community meeting place located within the Ute Mountain Ute Reservation at White Mesa, San Juan County, Utah.

(ii) Plaintiff shall also provide notice by causing the terms of this Agreement and the proposed Order of the Court to be presented at meetings of the aforementioned Chapters.

(iii) The Defendant shall provide notice by posting a copy of this Agreement, the proposed decree, and the Notice to Class at the office of the Clerk of the Seventh District Court for San Juan County, and at the other offices of the Clerk of Court in the Seventh District, and the San Juan County Attorney's Office. Defendant shall also post notice of this settlement by advertising this Agreement, Notice to Class and the proposed decree in a newspaper of general circulation in San Juan County for a period of one month. Notice shall also be accomplished by advertising in the Navajo tribal newspaper, The Navajo Times.

(iv) Plaintiff and Defendant shall file proof with the Court that they have done the foregoing in affidavit form within 10 days

after said acts have been completed. Any objections should be heard by the Court on a date to be set by the Court, which counsel recommend by 60 days after this Agreement is filed with the Court.

1 Defendant shall formulate and implement a plan to assure that Seventh District Court jurors are chosen from sources reflective of a cross section of the community of San Juan County. Defendant and those acting for and in its behalf will have reasonable discretion to undertake actions and implement policies which will comply with the goals of this paragraph and any plan filed pursuant to this paragraph. The plan, inter alia, shall include the following:

a. The names on the District Questionnaire Lists provided to the Seventh District Court pursuant to the plan shall be within on average, plus or minus, 5 per cent of the estimated percentage of adult Native Americans in San Juan County in any given year. This requirement shall be implemented as soon as is reasonably practicable, and no later than January 31, 1991. The parties recognize that there may be administrative difficulties in implementing the provisions of this sub-paragraph and that the Defendant may for good cause petition the Court for an extension of time in which to bring the jury lists into compliance. Prior to resorting to further litigation, the parties shall engage in reasonable discussions to resolve their differences informally.

b. The plan shall provide for the use of a juror-qualification questionnaire which shall be adequate to determine the qualifications of the jurors.

c. The plan shall provide for the collection and proper use of demographic data sufficient to comply with applicable statutes and regulations.

d. The plan shall provide for the identification of jurors on the Qualified Lists by name, address, and race.

e. The plan shall also provide for the routine use of compulsory process and sanctions which are available under Utah state law or as may be available pursuant to any agreement with the Navajo or Ute tribes to encourage compliance by jurors with jury selection procedures. The parties recognize, however, that compulsory process is not currently available.

f. Nothing in the plan or this agreement shall be construed to prevent litigants and jurors from raising in a criminal case or in a separate action the question of improper peremptory-juror challenges.

g. The plan shall be filed with the Court within six months of this Court's entry of the permanent injunction and decree. Plaintiff may within 60 days following submission of the plan file with the Court their position regarding any such proposed plan. Prior to doing so, the parties shall take reasonable measures to informally resolve any differences. The Court may then schedule a hearing on the proposed plan. At such hearing, the Court may approve the plan, modify the plan, or direct that Defendant submit a new plan. If no comments are received, the plan shall go into immediate effect.

(h) Defendant may submit new or supplemental plans in the

manner set forth in this paragraph as may be needed to implement the purpose and goals of this agreement.

5. The Defendant shall maintain at its office and in the office of the Clerk of the Seventh District Court for San Juan County, the following records:

a. The District Court Questionnaire Lists used for the Seventh District Court for San Juan County for the time period in which this Court retains jurisdiction over this action.

b. The Trial Juror Venire lists and Trial Venire lists for each case in which such lists are generated for the period of time in which this Court retains jurisdiction over this action.

c. A record of all compulsory process used to summons jurors to jury duty or to complete juror qualification questionnaires.

d. A record adequately explaining the basis for all excused and disqualified jurors during the period in which this Court retains jurisdiction.

e. Each court-approved plan formulated pursuant to this Agreement.

f. Plaintiff, members of the class, and class counsel shall be provided with reasonable access to information pertaining to Defendant's compliance with this agreement and the court's decree.

g. For the first three years that this Agreement and the Court's Decree is in effect, Defendant shall file an annual report with this Court stating, with specificity, the acts and procedures undertaken to ensure compliance with this Agreement and the plan or plans submitted pursuant thereto.

6. If Defendant cannot comply with this agreement, the Court's decree, or any plan it submits pursuant to this agreement, then Defendant shall notify Plaintiff and class counsel, and the Court within 60 days of such occurrence.

7. Upon the expiration of a reasonable period of time following the provision of notice to the class, and after resolving all objections of the class to this Agreement and the proposed decree, the Court shall enter a decree incorporating this Agreement therein and restraining and enjoining the parties to abide by the terms and provisions of this Agreement. The Court's order will specify that the defendant-judges are dismissed from this action.

8. Defendant, and all those acting in concert with it, shall, in regards to jury selection procedures and activities in the Seventh Judicial District Court for San Juan County, abide by all applicable laws, regulations, and constitutional provisions.

9. The requirements of this decree may be modified upon a showing of a significant change in law or fact. If at the time modification is sought the foregoing criteria does not reflect the current rule, then the parties shall comply with contemporary standards for the modification of consent decrees under the rules of civil procedure.

10. The parties have made a separate settlement as to the payment of the costs and attorneys fees incurred by Plaintiff in bringing this action for the period up to and including the date of the Court's entry of the permanent injunction and decree. If the parties cannot agree as to Plaintiff's costs and fees, the matter

shall be submitted to the Court for resolution.

11. The parties, or any member of the plaintiff-class, may petition the Court for enforcement of this agreement, the Decree, or any order or subsequent orders issued by the Court. Prior to petitioning the Court, the parties shall undertake reasonable efforts to resolve such agreements informally.

12. This Agreement of Parties, and any Order of the Court, shall be binding on the heirs, successors, and assigns of the parties hereto, including any courts of general jurisdiction that may succeed the present Seventh District Court for San Juan County. The parties recognize that there are discussions underway concerning the division of San Juan County into two counties. Should San Juan County be divided, the Defendant shall be afforded a reasonable opportunity to formulate a new plan, if necessary.

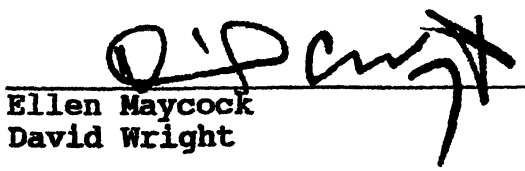
13. This Court shall retain jurisdiction over this action to enforce the parties' compliance with the terms of this Agreement and all orders of the Court. Should the Court's retention of jurisdiction terminate, Defendant's obligation to abide by the permanent injunction of the Court shall continue.

14. Nothing in this Agreement constitutes, or shall be construed as, an admission by Defendants of any of Plaintiff's allegations.

Dated this 26th day of March, 1996.

Eric P. Swenson
Jensie L. Anderson

Attorneys for Plaintiff



Ellen Maycock
David Wright

Attorneys for Defendants

Exhibit A, Agreement of Parties
Crank v. Utah Judicial Council

| I | II[1] | III[2] | IV[3] | V[4] | VI[5] |
|---|---|---|---|---|---|
| Year | Numbers | Percentages | 18 Years | Absolute | Comparative |
| 1990 | 209/599 | 34.89 | 51.68 | 16.79 | 32.49 |
| 1991 | 242/536 | 45.15 | 51.68 | 6.53 | 12.64 |
| 1992 | 161/432 | 37.27 | 51.68 | 14.41 | 27.88 |
| 1993 | 107/300 | 35.67 | 51.68 | 16.01 | 30.98 |
| | 141/300 | 47.00 | 51.68 | 4.68 | 9.06 |
| | 138/300 | 46.00 | 51.68 | 5.68 | 10.99 |
| | 152/300 | 52.33 | 51.68 | -0.65 | -1.26 |
| 1994 | 171/324 | 52.78 | 51.68 | -1.10 | -2.13 |
| | 226/500 | 45.20 | 51.68 | 6.48 | 12.54 |
| 1995 | 190/499 | 38.08 | 51.68 | 13.60 | 26.32 |
| | 238/500 | 47.60 | 51.68 | 4.08 | 7.89 |
| 1996 | 170/500 | 34.00 | 51.68 | 17.68 | 34.21 |

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[1] Column II is the number of Native Americans on San Juan County jury lists, identified in the Agreement of Parties as the District Court Questionnaire List, as counted by Irene Black for the years 1990-1996. For the years 1932 to 1970, there were no Native Americans on any jury lists.

[2] Column III is the percentage of Native Americans on the San Juan District Court Questionnaire Lists as counted by Irene Black.

[3] Column IV is the percentage of Native Americans aged 18 years and older, in San Juan County, recorded in the 1990 U.S. Census. The figure, 51.68%, does not take into account any census under count, nor does it reflect the growth of the Native American population in San Juan County relative to the non-Native American population.

[4] Column V contains the absolute disparities for Native Americans. The absolute disparities are calculated by subtracting Column III from Column IV.

[5] Column VI contains the comparative disparities for Native Americans. The comparative disparities are calculated by dividing column V by column IV and multiply by 100.

# ADDENDUM

Exhibit 2, Decree

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Attorneys for Plaintiff



IN THE SEVENTH JUDICIAL DISTRICT COURT, SAN JUAN COUNTY

STATE OF UTAH

| | |
|---|---|
| LOREN CRANK, JR., Plaintiff, | |
| v. | ORDER AND DECREE |
| UTAH JUDICIAL COUNCIL, Defendant. | Civil No. 9307-26 |
| | Judge Roth |

The Court has reviewed the Agreement of Parties and has found that injunctive relief shall be granted in accordance with it.

It is therefore ORDERED, ADJUDGED, AND DECREED:

1. The Court approves and adopts the Agreement of Parties dated March 26, 1996 which is hereby incorporated by reference into this Judgment and Decree.

2. The parties have filed satisfactory proof showing that they have provided appropriate notice to the class as required by the Agreement of Parties.

3. The Defendant Utah Judicial Council, its agents, officers, successors and all persons acting in concert or participating with it, are hereby ordered to comply with the provisions of the Agreement of Parties.

4. Defendants Lyle R. Anderson, Bruce K. Halliday, and Bryce K. Bryner are hereby dismissed from this action, with prejudice.

5. The Court shall retain jurisdiction over this action pursuant to Paragraph Thirteen of the Agreement of Parties.

Dated: 10/27/96.

DISTRICT COURT JUDGE

Approved As To Form:

Eric P. Swenson
Jensie L. Anderson

Attorneys for Plaintiff

Ellen Maycock
David C. Wright

Attorneys For Defendant

## ADDENDUM

Exhibit 3, Ruling

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

LOREN CRANK, JR.,

Plaintiff,

vs.

UTAH JUDICIAL COUNCIL,

Defendant.

RULING ON ATTORNEY'S FEES

Civil No. 9307-26

The Supreme Court of Utah remanded this case on the issue of Crank's claim for attorneys fees under 42 U.S.C., section 1988, and Judge Anderson's claim for attorney fees under subparts (2) and (3) of Utah R. Civ. P. 11(b).

The Court will first deal with the issue of Crank's claim for attorneys fees. It must be kept in mind that Crank lost on appeal on his attempt to have Judge Lyle R. Anderson found in contempt of court. This was a major thrust of his supplemental proceedings. The Court will, however, only deal with the issue of Crank's attorneys fees asserted against the Utah Judicial Council.

The Utah Supreme Court stated:

> "Crank asserts that he is entitled to attorney fees under 42 U.S.C., Section 1988(b), which provides, in pertinent part, that 'in any action or proceeding to enforce a provision of section [] ... 1983 ... of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs....' Crank argues the district court erred in holding he was not a prevailing party under this standard and in refusing to award him attorney fees...."

The Court then reviewed Arvinger v. Mayor of Baltimore, 31 F.3d 196, 200-02 (4th Cir. 1994) and quoted the test as follows:

> "'...When plaintiffs are forced to litigate to preserve the relief originally obtained,' and where the issues pertaining to both actions are 'inextricably intermingled,' the plaintiff may be treated as a prevailing party. Id. at 202. Crank's motion facially meets this test."
>
> "Whether the motion to enforce the Agreement qualifies Crank for prevailing party status under section 1988 presents a separate question, however, to which we now turn. In Farrar v. Hobby, 506 U.S. 103 (1992), the United States Supreme Court addressed the question of the standards applicable to an award of attorney fees under section 1988. The Farrar Court prescribed as follows the standard for determining prevailing party status:
>
> > 'To qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgement against the defendant from whom fees are sought ... or comparable relief through a consent decree or settlement.... Whatever relief the plaintiff secures must directly benefit him at the time of the judgement or settlement.... In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'
>
> Farrar, 506 U.S. at 111-12 (citation omitted.)
>
> In this case, it is not clear whether the district court considered this standard." CRANK v. UTAH JUDICIAL COUNCIL, 20 P.3d 316-318 (Utah 2001)

The trial court found that a basic question was whether or not supplemental proceedings were necessary. The Agreement was filed on May 13, 1996 and the order to show cause was filed September 3, 1997 (16 months). Judge David E. Roth tried the issues on supplemental proceedings, and, among other rulings, made the following findings and rulings on December 11, 1998:

> "The first thing I would like to say is that in my opinion from what I have seen of this case and during these last two days, I believe that on both sides of this case the parties are properly motivated and well intentioned. Both

trying to solve a similar problem but doing it in different ways from different prospectives. And while I agree and disagree with both of you to some extent, I don't see any villains in this courtroom....

It is an agreed fact in this case that the Judicial Council did not meet the plan timely. The question is, were they justified in not meeting the plan timely. They have given reasons for their failure to comply....

I think it's commendable that they have tried to work with the Navajo Nation in solving this problem... I think it's a good thing for the Council to work with them in solving this problem and I find that that has led to some of the delays in coming into compliance with the agreement.

Had the Council asked for an extension with that explanation, I very likely would have granted it.

I understand that Counsel thought that by communicating with Mr. Swenson they were free to continue to work and try to solve this problem without reporting to the Court. Without submitting a plan....

I appreciate efforts to avoid litigation, but that doesn't mean that you can't get together and submit a stipulated request for an extension. I see no effort, there is no evidence that that was attempted."

Judge Roth found both parties to be "properly motivated" and "well intentioned." He did not see "any villains" in the courtroom. He then said, "The question is, were they [the Council] justified in not meeting the plan timely." He seemed to find that the Council was justified because he found it commendable that the Council was working with the Navajo Nation to solve the problem. He found that such work "has led to some of the delays in coming into compliance with the agreement." He also stated he would probably have extended the time if the parties had asked for it. He was bothered that the parties hadn't got together and stipulated to a request for an extension. He said, "I see no effort, there is no evidence that that was attempted." The Agreement itself anticipated that an "extension of time in which to bring the jury lists into compliance" might be needed. See paragraph 4.a. The same paragraph of the Agreement provided that "Prior to resorting to further litigation, the parties shall engage in reasonable discussions to resolve their differences informally." The parties exchanged letters but did not

"engage in reasonable discussions to resolve their differences." Both parties were in default in this provision of the Agreement.

What did Crank accomplish by his motion for supplemental proceedings? Was he a "prevailing party" under section 1988? Did he "obtain some relief on the merits of his claim?" This Court's task on remand is to determine whether, based on the facts and the Farrar standard, Crank qualifies as a prevailing party." This Court does not believe he qualifies as a prevailing party.

The Council filed a "Response Brief on Remand" dated December 17, 2001. This Court is persuaded by the facts, arguments and conclusions contained therein and adopts them as part of the ruling herein. Many quotes from that brief follow without credit being given to the writer of the brief for them.

The Council determined to obtain the best possible source list of Native Americans--a tribal enrollment list from the Navajo Nation itself, which would then be merged with drivers license and voter lists to form the master jury list. A usable list was finally obtained in time for the second half of 1998. The Council had, admittedly, not filed required status reports with the trial court. But it was undisputed that plaintiff was updated regularly and often.

The Supreme Court held that the Council's stipulation that it had not filed its reports with the trial court did not confer prevailing party status. The Court held that "because the stipulations did not create any legally-enforceable alteration in the Council's behavior toward Crank, the [trial] could not employ them as a predicate for a finding that Crank was a prevailing party." The Council was waiting for the Navajo Nation to sign the Agreement before filing it.

The trial court's ruling that the Council take action to increase the percentage of Native Americans on future inadequate questionnaire lists does not confer prevailing party status. The

ruling did not benefit Crank and it did not alter the relationship already specified under the Agreement. The Council already had "reasonable discretion to undertake actions and implement policies which will comply with the goals [of the Agreement] and any plan filed pursuant to [paragraph 4 of the Agreement]." The Council could also "submit new or supplemental plans . . . as may be needed to implement the purpose and goals of this agreement." Agreement, paragraphs 6-7 The Council was already obligated to "abide by all applicable laws, regulations, and constitutional provisions" in connection with its jury selection procedures. Agreement, paragraph 8. Under the Agreement, the Council either had to implement measures to hit the target or seek relief from the trial court. Nothing in the trial court's order changes that. The court's ruling, therefore, did not materially alter the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."

The evidence shows that the Council always intended to meet its obligations. The Council had already hired someone to obtain the Navajo list and to survey the residents along the Arizona border. Each time a new questionnaire list was to be drawn the Council believed it was about to get the list it needed to merge with the other source lists. So, there was no need for interim measures. The Council was already working diligently to satisfy the Agreement, so that Cranks motion did not alter the Council's behavior. The Council began working with the Navajo Nation in January of 1996, three months before the case settled. The relationship with the Navajo Nation is unprecedented. Judge Roth found the Council's effort commendable. He also found that "it was reasonable for [the Council] to focus its efforts on supplementing the mast list for San Juan County."

The legal enforceability of the trial court's order does not alter the Council's relationship with, or confer a benefit on Crank. The Agreement was always legally enforceable. So a second

order with the same instructions changed nothing. The mere filing of the plan as ordered by the trial court did not confer a benefit on Crank. It was the plan's implementation that conferred the benefit, not the filing of it with the court. The Council's plan showed results during the second half of 1998, before the written plan was actually filed. The reforms were already underway and positive results were obvious at the time of trial and the plan had not been filed. The plan was the heart of the Agreement, however, the plan was being implemented before it was filed and Crank knew what the plan was and what was being done to implement it.

The order to file the yearly reports already required under the Agreement did not confer a benefit on crank. Crank was well aware of the delay in getting the additional source list from the Navajo Nation and he knew the reason it was delayed. Crank was not better informed after the filing of the annual reports than before. Again, he knew the plan and he knew what was being done to implement it.

Crank objects to the arguments put forth by the Council in that brief. Some of the Court's comments on them follow.

Trial in this case was concluded on December 11,1998. The trial court required the Council to file the order, follow it up with annual compliance reports and take reasonable measures to correct future jury lists that may have deficient numbers of Native American jurors. The last provision is the only one that suggests anything new. Even this, however, is not really new. The Agreement provided in paragraph four (4) that, "Defendant shall formulate and implement a plan to assure that Seventh District Court jurors are chosen from sources reflective of a crosss section of the community of Jan Juan County." Necessarily implied within this term of the Agreement is the requirement that defendant take reasonable measures to correct jury lists that may have deficient numbers of Native American jurors. The Court does not find this to be

"relief" that was obtained through supplemental proceedings. Crank knew the Council's plan before filing supplemental proceedings and disagreed with it. He had an ongoing dispute with Judge Lyle R. Anderson. He wanted the trial court and Council to use supplemental sampling to create a jury list. Crank also knew the percentages of Native Americans on the jury lists being used prior to the time he filed supplemental proceedings.. Exhibit A of Agreement of the Parties contains a chart. Column III shows the percentage of Native Americans on the San Juan District Court Questionnaire Lists from 1990 thru the middle of 1996.

| | | |
|---|---|---|
| 1990 | 34.89 | |
| 1991 | 45.15 | |
| 1992 | 37.27 | |
| 1993 | 45.25 | |
| 1994 | 48.99 | |
| 1995 | 42.84 | |
| 1996 (1/2 yr) | 34.00 | (Up to filing of the Agreement) |

Corresponding figures since the filing of the Agreement follow:

| | | |
|---|---|---|
| 1996 | 45.8 | (Last 1/2 of year) |
| 1997 | 43.2 | Up to filing of supplemental proceedings) |

The 1990 census showed that 51.68 percent of San Juan County residents were Native Americans. The Agreement called for the Council to be within five points of the target or 46.68 percent. The percentages support the fact that the Council was conscientiously attempting to comply with the Agreement at all times. It is also interesting to note that "for the years 1932 to 1970, there were no Native Americans on any jury lists."

The percentages since may be of interest but are not related to the decision.

| | |
|---|---|
| 1998 | 45.45 |
| 1999 | 49.70 |
| 2000 | 48.30 |

Crank did not obtain anything of substance more after filing supplemental proceedings than he already had. The fact that the plan and annual compliance reports were filed did not give him anything new. The only thing the Council was waiting for before filing was the approval of the Navajo Nation. Had Crank requested the filing without approval of the Navajo Nation, it would have been forthcoming.

Crank also argues that "The Supreme Court has held that a plaintiff prevails when actual relief on the merits materially alters the legal relationship of the parties by modifying the defendant's behavior in a way that directly benefits plaintiff." [Farrar case] This Court does not differ with the legal principle involved but does differ with the application that Crank urges. Crank states that, "The Council needed the prod of a legal proceeding before taking action." This argument is a restatement of the prior argument concerning the filing of the plan, etc., but based on a different legal theory. This Court is not persuaded by it.

Crank also urges an award of attorney fees based on "the public interest test." There is a public interest in having Native American jurors chosen in a fair and open jury selection process. Crank urges "this is a factor only in cases where it is alleged that plaintiff's success was limited in nature." There are two problems with the application of this test in this case. First, this Court has found that Crank has not prevailed even in a limited nature. It also appears to be a point which plaintiff did not preserve on appeal because he "did not adequately brief it in his motion for fees before the trial court." Crank, 20 P.3d 319, n.17. Crank, however, insists that his claim is based solely on "the attorneys fee provisions of 42 U.S.C., section1988. In either case, the Court rejects his arguments.

Crank's request for costs and attorneys fees is denied.

The Court will now deal with the issue of Judge Anderson's claim for attorney fees under subparts (2) and (3) of Utah R. Civ. P. 11(b).

The Utah Supreme Court held that the subparagraphs of Utah R.Civ.P., Rule 11(b)

> ". . . furnish a distinct basis for a finding of a violation of the rule [and] while bad faith may often be associated with violation of subparagraph (2) and (3), such is not a necessary element. A lawyer may bring frivolous or inadequately supported claims merely by failing to exercise the minimal required level of professional care and judgment." Crank v. Utah Judicial Council, 20 P. 3d 316

Rule 11(b) provides as follows:

> "Representations to court. By presenting a pleading, written motion, other paper to the Court (whether by signing, filing, submitting or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument fofr the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, specificall so identified, are reasonably based on a lack of information or belief.

Rule 11(c) provides as follows:

> Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation."

At the beginning of his brief of December 14, 2001, Eric P. Swenson states, "This Court should view the lengthy recitation of this case made in Judge Anderson's brief with caution because the judge's role in this case is multi-faceted. He is involved as a litigant. He appeared as a defense witness for the Judicial Council. 1645, Page 225. He assists the Judicial Council in

implementing the Agreement and Consent Decree, e.g., R. 685-696. He also monitors the Council's compliance. R. 1621 (Addendum to Judicial Council Plan)."

The Court is asked to use caution in in reviewing Judge Anderson's brief because he is a "litigant." Judge Anderson is a litigant in much the same way that Mr. Swenson is a litigant. Neither are really parties to the action. There was an attempt by Mr. Swenson to have Judge Anderson found in contempt and there is an attempt by Judge Anderson to have Mr. Swenson sanctioned.

This Court finds the following to be facts. Judge Anderson was dismissed with prejudice as a party to the lawsuit on October 27, 1996. He was not a party to the Agreement between Crank and the Council which had been signed about March of 1996. The Agreement required the Council to adopt a plan that would, by January 31, 1997, provide jury questionnaire lists. On July 18, 1997, Mr. Swenson, acting for a criminal defendant not a party to this proceeding, challenged the composition of the questionnaire lists for the second half of 1997. Judge Anderson found that the 44.6% of the potential jurors were American Indians. He further found that the disparity of 7.08% was not of constitutional dimension and denied the motion. On September 3, 1997, Crank filed a motion to enforce the consent decree. Judge Anderson was included in the motion. Mr. Swenson suggested that, "The Court should consider whether Judge Anderson should be jailed for what can only be described as flagrantly racist conduct." Judge Anderson was never made a party to these supplemental proceedings. The motion added Judge Anderson to the case caption designating him as a "contemnor." One of the reasons Mr. Swenson referred to Judge Anderson's conduct as "flagrantly racist" was because Judge Anderson had ruled against him in the July 18, 1997 case. Judge Anderson filed a motion to strike which was heard on August 14, 1998. The trial judge granted the motion to strike Judge Anderson. In doing so he said, "I find that Judge

Anderson has no affirmative duty that arises out of this Agreement. I also find that he could only be in contempt of this Court under the Agreement if he did something to frustrate the Council's efforts to comply with the Agreement. I find no evidence of that.... Quite frankly, I don't think it's even a close call to grant the Motion to Strike." This Court also has reviewed the files and records and finds no action on the part of Judge Anderson which would indicate wrongdoing of any kind. After the trial court granted Judge Anderson's motion to strike, Crank abandoned his claim to find the Council in contempt of court. A trial was held on the other issues on December 10-11, 1998. Crank appealed the rulings of the trial court denying his request for attorney fees against the Council and the motion to strike Judge Anderson and the refusal to find him in contempt of court. The Utah Supreme Court affirmed the motion to strike Judge Anderson and the refusal to hold him in contempt of court.

Mr Swenson violated Rule 11(b)(1). He was motivated in part by the rulings Judge Anderson made against him in the case tried on July 17, 1997. This is when he describes Judge Anderson's conduct as "flagrantly racist." This does not become apparent until August 14, 1998, when the trial court ruled against him, yet he continued to pursue contempt against Judge Anderson. The purpose to harrass and embarrass then becomes apparent.

Mr. Swenson violated Rule 11(b)(2). He never argued that the court should extend, modify or reverse the law or establish new law. He contended that the existing law warranted the relief he sought. The Agreement imposed no affirmative duty on Judge Anderson to construct an appropriate master jury list. The Council was obligated to construct the list. Judge Anderson was bound to use the list. Judge Anderson was not a party to this action and Mr. Swenson took no action to make him a party. All action against Judge Anderson should have been abandoned after the August 14, 1998, hearing wherein the trial court granted Judge Anderson's motion to strike.

At that time it was clear that Judge Anderson was not "flagrantly racist," was not a party to the Agreement and had no duty with respect to constructing the master jury list. If anyone should have been found in contempt of court it should have been someone working for the Council. Even this was not warranted because the Council had been acting in good faith throughout the proceedings. Mr. Swenson continued, however, to assert that Judge Anderson had an obligation to enforce the Agreement.

Mr. Swenson violated Rule 11(b)(3). This paragraph requires counsel to certify that his allegations and contentions are supported by evidence. It was clearn that Judge Anderson was not a party to the Agreement. No sworn facts indicated that Judge Anderson had violated the Agreement or had made an attempt to interfere with its implementation. The Supreme Court noted that, "there are no concrete factual allegations indicating that Judge Anderson undertook any actions that could be remotely contrued as hampering the Council's efforts."

The Court finds that the attorneys fees outlined by counsel for Judge Anderson to be reasonable in the amount of $5,931.24 for pre-appeal work and $11,402.90 for appeal and post-appeal work, or, a total attorneys fees of $17,255.00 as of November 16, 2001. The Court also finds them to be necessary.

The Court finds that counsel for the Plaintiff has violated Rule 11(b), subparts (1), (2) and (3) and should be sanctioned therefor. The Court is aware of the many ways there are to sanction a lawyer, but in this case the most effective method is the pocketbook. As a sanction, Eric P. Swenson is ordered to pay to Anderson & Anderson, P.C. one-half of Judge Lyle R. Anderson's attorneys fees for appeal and post-appeal work in the amount of $5,701.45. The sanction imposed is not based upon some formula but is the judgement of the Court that it is reasonable. It is meant as a sanction and the fact that Judge Anderson is not reimbursed for all of his attorneys

fees is not a consideration. It was limited to the appeal and thereafter because the trial court found both parties to be "well-motivated" and "well intentioned" at the trial on December 11, 1998.

This Court finds that the ACLU played a relatively small part in the supplemental proceedings. Their counsel should not be sanctioned.

In summary, Crank is denied attorney fees from the Utah Judicial Council. Judge Lyle R. Anderson is granted attorneys fees against Eric P. Swenson in the amount of $5,701.45.

Counsel for the Utah Judicial Council is directed to draw a formal less wordy judgment.

Dated this 6th day of February, 2002.

DOUGLAS L. CORNABY, Senior Judge

I certify that on the 6th day of February, 2002, I caused to be served via the U.S. Mail a copy of the foregoing to:

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DOUGLAS L. CORNABY

# ADDENDUM

Exhibit 4, Rule 11

lines and signatures in permanent black or blue ink.

Paragraph (f). The changes in this paragraph make it clear that the clerk must accept all papers for filing, even though they may violate the rule, but the clerk may require counsel to substitute conforming for nonconforming papers. The clerk is given discretion to waive requirements of the rule for parties who are not represented by counsel; for good cause shown, the court may relieve parties of the obligation to comply with the rule or any part of it.

**Amendment Notes.** — The 1998 amendment added the last sentence in Subdivision (a).

The 2000 amendment inserted "(and commissioner if applicable)" after "judge" near the end of the first sentence in Subdivision (a).

**Compiler's Notes.** — Subdivisions (a) to (c) of this rule are similar to Rule 10, F.R.C.P.

NOTES TO DECISIONS

Exhibits.
—Use as pleadings.
Cited.

**Exhibits.**

**—Use as pleadings.**

While an exhibit may be considered as a part of a pleading to clarify or explain the same, an exhibit to a pleading cannot serve the purpose of supplying necessary material averments nor can the content of the exhibit be taken as part of the allegations of the pleading itself. Girard v. Appleby, 660 P.2d 245 (Utah 1983).

**Cited** in State ex rel. Cannon v. Leary, 646 P.2d 727 (Utah 1982).

COLLATERAL REFERENCES

**Am. Jur. 2d.** — 61A Am. Jur. 2d Pleading §§ 23 to 56, 69, 117.

**C.J.S.** — 71 C.J.S. Pleading §§ 5, 9, 63 to 98, 371 to 375, 418.

**A.L.R.** — Propriety of attaching photographs to a pleading, 33 A.L.R.3d 322.

Propriety and effect of use of fictitious name of plaintiff in federal court, 97 A.L.R. Fed. 369.

## Rule 11. Signing of pleadings, motions, and other papers; representations to court; sanctions.

(a) *Signature.* Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) *Representations to court.* By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) *Sanctions.* If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How initiated.*

(A) *By motion.* A motion for sanctions under this rule shall be made

separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(B) *On court's initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of sanction; limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) *Inapplicability to discovery.* Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.
(Amended effective Sept. 4, 1985; April 1, 1997.)

**Advisory Committee Note.** — The 1997 amendments conform state Rule 11 with federal Rule 11. One difference between the rules concerns holding a law firm jointly responsible for violations by a member of the firm. Federal Rule 11(c)(1)(A) states: "Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." Under the federal rule, joint responsibility is presumed unless the judge determines not to impose joint responsibility. State Rule 11(c)(1)(A) provides: "In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees." Under the state rule, joint responsibility is not presumed, and the judge may impose joint responsibility in appropriate circumstances. What constitutes appropriate circumstances is left to the discretion of the judge, but might include: repeated violations, especially after earlier sanctions; firm-wide sanctionable practices; or a sanctionable practice approved by a supervising attorney and committed by a subordinate.

**Compiler's Notes.** — This rule is substantially similar to Rule 11, F.R.C.P.

NOTES TO DECISIONS